(2)

No. 87-1408

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FRANK V. AIELLO,

Petitioner,

v.

CALVIN MARTIN and STANLEY LEWIS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under Alaska law, statements made in a judicial context are absolutely privileged and cannot form the basis for a tort action against the speaker. Is there any reason for this Court to disturb two lower federal courts' decisions which properly applied Alaskan state-law privileges to bar an Alaskan state-law tort claim?

LIST OF PARTIES

Frank V. Aiello, Petitioner

Calvin Martin, Respondent

Stanley T. Lewis, Respondent

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The United States District Court for the District of Alaska, Judge Andrew J. Kleinfeld, granted Respondents' motions for summary judgment on February 4, 1987, after extensive remarks on the record. The Court of Appeals for the Ninth Circuit affirmed Judge Kleinfeld's decision in a written Memorandum Opinion dated November 23, 1987. Neither opinion below was reported. Both are included in the appendix to this Opposition.

JURISDICTION

The Court of Appeals filed its Memorandum Opinion on November 23, 1987, and amended it on January 6, 1988. Petitioner Aiello filed his Petition for Writ of Certiorari on February 20, 1988, invoking this Court's jurisdiction under 28 U.S.C. § 2102(c).

STATUTES INVOLVED

This case was decided on principles of Alaskan common law, and no statutes, either state or federal, are involved.

SUMMARY OF ARGUMENT

Petitioner Frank V. Aiello concedes that Alaska law provides absolute privileges from tort liability for participants in judicial proceedings. However, he wishes to base his common-law tort claims on clearly privileged conduct. He therefore argues that a federal court should disregard settled state law and graft a "recklessness" exception onto the state-law privileges.

No constitutional issues are presented here; no federal statutes or parties are involved; no conflict among federal circuits is alleged; Aiello concedes that the Courts below decided his case in full accordance with Alaska law which, in turn, is consistent with the law of virtually every other American jurisdiction. There is no public interest, either state or federal, in disturbing a well-established system of tort

privileges specifically designed to encourage vigorous advocacy and candid testimony. In short, there is no interest whatever at stake in Aiello's Petition except his own and no reason for this Court to review the judgments of the two Courts below.

STATEMENT OF THE CASE[1]

In June 1982 an Alaska limited entry permit, which allowed the holder to commercially fish in designated Alaskan waters, was transferred to Paul Roller. The permit had been issued in the name of Danny Martin but was in the possession of Respondent Calvin Martin, Danny's father. CR 128, exh. A. Roller later claimed that Calvin Martin had intended the transfer to be a gift, CR 134, exh. C, pp. 3-5; Martin on the other hand, claimed that the transaction had been a sale and that he was entitled to either $100,000 from Roller at the end of the 1982 summer fishing season or the return of the permit. CR 128, exh. B.

In late July or early August 1982, Martin retained Respondent Stanley Lewis, an Anchorage attorney, to represent his interest in his contract with Roller. CR 134, exh. B, pp. 2-3. On August 10, 1982, on Martin's behalf, Lewis called the Alaska Commercial Fisheries Entry Commission (CFEC), the state agency with authority to regulate permit transfers. CR 128, exh. D; CR 135, exh. D, pp. 10-14. During the course of this telephone call, Lewis gave a CFEC employee certain details of the Martin-Roller transfer while seeking general information about permit transfers. Aiello contends that Lewis also urged the CFEC to do what it could to halt any attempted transfer of the permit from Roller to an "unnamed transferee." Pet., pp. 7-8.[2] Lewis' telephone call is one of the three events on which Aiello based his tort claims in the District Court. CR 143, exh. 1, pp. 35-41.

Two weeks after his call to the CFEC, Lewis filed suit against Roller on Martin's

behalf in Alaska's superior court, seeking damages and the return of the permit or its value. The complaint alleged the same details of the Martin-Roller transaction as Lewis had earlier described to the CFEC. Pet., pp. 7, 11; CR 138, exh. B.[3]

Also in August 1982, Roller allegedly agreed to sell the disputed permit to Petitioner Aiello, an acquaintance of his and a fellow California attorney. CR 134, exh. C, p. 8; exh. A, pp. 2-3. Aiello had never visited Alaska, nor had he ever had any experience in commercial fishing. See CR 161. The sale, for $63,492, was to be secured by a deed of trust on all of Aiello's California property. CR 134, exh. A, pp. 13-18.

The CFEC, however, refused Roller's request for a transfer of the permit to Aiello, informing him on October 14, 1982, that official proceedings had begun against the permit pursuant to Alaska Statute 16.43.355 (since renumbered as 16.43.970), which in part provides for the imposition of

penalties for false statements made in the course of permit transfers. CR 128, exh. E. In December 1982 Aiello sued Martin and Lewis in California state court, alleging that Lewis' call to the CFEC, two weeks before Martin v. Roller was filed, had, by alleging that Martin had a claim to the permit and thus alerting the CFEC to the permit's clouded status, interfered with his contract to purchase the permit from Roller. See CR 41.[4]

The CFEC convened a hearing on the Martin-Roller transfer in February 1983. One issue at the hearing was the identity of the person who had checked a box on the official transfer form designating the Martin-Roller transfer as a "gift." In response to questioning by the hearing examiner, Martin testified that he did not recall whether it had been he. CR 128, exh. G, pp. 12-14. A document examiner later testified that the same ink had been used on the front of the form, which Martin conceded having filled out himself, and the checked

"gift" box. CR 128, exh. G, pp. 4-7. Answering a request for admissions in Martin v Roller a few months later, Martin conceded that the box must have been checked by either him or his son Danny. CR 129, exh. G. This sequence, beginning with Martin's lack of recall at the CFEC hearing and ending with his admission that the box must have been checked by him or Danny after all, formed the second basis for Petitioner Aiello's two tort claims in the court below; Aiello claimed that the difference between the testimony and the later admission constituted an intentional "outrage" on the part of Martin and Lewis, by which he, the third-party buyer, had been damaged. CR 134, exh. A, pp. 11-12; CR 50.

In October 1986, Respondents Martin and Lewis moved for summary judgment on Aiello's two tort claims in the District Court, raising the bars of absolute privileges accorded attorneys, parties, and witnesses in preparation for and in the course of judicial proceedings. On that basis, and on

several alternative bases as well, District Judge Andrew J. Kleinfeld granted defendants' motions after hearing oral arguments on February 4, 1987. On November 23, 1987, the Court of Appeals affirmed the District Court's ruling in all respects.

REASONS FOR DENYING THE WRIT

A. Aiello's Claims Were Rightly Decided Under Alaska Law

1. Under Alaska Law, Respondents' Statements Were Absolutely Privileged

Aiello's two tort claims -- for intentional interference with prospective economic advantage and for outrage -- are based upon three separate "statements" by the respondents: (1) Lewis' telephone call to the CFEC on Martin's behalf; (2) Martin's testimony at the CFEC hearing; and (3) Martin's response to a request for admission in Martin v. Roller. Both torts are barred as a matter of Alaska law because all three "statements" on which they are based are absolutely privileged.[5]

Alaska applies the absolute privileges of the Restatement (Second) Torts (1977), which protect any statement of an attorney, party, or witness made during the course of a judicial proceeding as long as the statement "has some relation to the proceeding." See Restatement (Second) § 586 (Attorneys at Law), § 587 (Parties to Judicial Proceedings), and § 588 (Witnesses to Judicial Proceedings); McCutcheon v. State, 746 P.2d 461 (Alaska 1987) (absolute privilege for affidavits released to press over assistant attorney general's signature); Nizinski v. Currington, 517 P.2d 754, 756 (Alaska 1974) (absolute privilege for affidavit submitted by witness; corresponding privileges for attorneys, parties, and judicial officers recognized, at n. 7); Zamarello v. Yale, 514 P.2d 228, 231-32 (Alaska 1973) (absolute privilege for party's publication of lis pendens).

These three absolute privileges -- for attorneys, witnesses, and parties -- apply not only to defamation actions, but also to

any other tort causes of action that are based on statements made in a judicial context, including Aiello's claims for intentional interference with prospective economic advantage and outrage. Aiello concedes this in his Petition. Pet., pp. 28-29.[6]

Lewis' telephone call to the CFEC in August 1982 was privileged because it had "some relation to a proceeding that [was] contemplated in good faith and under serious consideration," Restatement § 586, comment d, as is conclusively proven by Lewis' filing of Martin v. Roller two weeks later reasserting the same claim. Section 586 "obviously covers communications made during investigation of a claim." Selby v. Burgess, 712 S.W.2d 898, 900 (Ark. 1986).

Furthermore, even assuming, as Aiello contends, that Lewis' call was intended to prompt the CFEC to investigate and possibly revoke Martin's permit before Aiello could enjoy its use, the call is still absolutely privileged: . "[A]ny communication with an

official agency designed to prompt investigation by that agency is absolutely privileged." Lebbos v. State Bar of California, 211 Cal.Rptr. 847, 853 (Cal.App. 1985). "A communication designed to prompt action [by an administrative agency] is as much a part of the 'official proceeding' as a communication made after the proceedings have commenced." Long v. Pinto, 179 Cal.Rptr. 182, 184 (Cal.App. 1981).

Martin's testimony before the CFEC enjoyed the absolute testimonial privilege of Restatement § 588. Nizinski, 517 P.2d at 756. His response to requests to admit in Martin v. Roller enjoyed the party's absolute privilege of Restatement § 587. Zamarello, 514 P.2d at 231.

Both the District Court and the Court of Appeals decided this case under Alaska's common law, on the basis of these absolute privileges. Judge Kleinfeld noted in his oral remarks "that both Martin and Lewis had numerous multiple privileges, any one of which would be sufficient to prevent the

action from going forward" (RT 32) and discussed in detail the witness' absolute testimonial privilege, the lawyer's absolute privilege to act and speak on behalf of his client in a judicial context, and the absolute privilege of both of them to communicate with the state agency charged with enforcement of the CFEC regulations. RT 33-34. The Court of Appeals agreed with Judge Kleinfeld's conclusion, holding: "In sum the clear and strong policies underlying the defamation privileges compel the conclusion that Martin's testimony before the CFEC, his responses to requests for admissions in Martin v. Roller, and Lewis' telephone call to the CFEC prior to filing suit on behalf of Martin, cannot be the basis for liability in tort." Memorandum, p. 4. Petitioner Aiello concedes that Alaska's law "provides a rationale for the decision of the Court of Appeals." Pet., p. 52.

2. Absolute Privileges Apply Regardless of the Merits of Martin's Contract Claim Against Roller

Seeking to undermine Alaska's privileges, Petitioner Aiello emphasizes the importance of an attorney's ethical obligation not to advance a fraudulent position. Pet., pp. 32-40. Respondents Martin and Lewis do not belittle the role of legal ethics in state-court litigation. In Aiello's blur of truisms regarding fraud and ethics, however, it is important to keep in mind the precise "fraud" Aiello alleges in this case: Lewis' advancement of his client Martin's interest in the fishing permit. Aiello's "fraud" argument is misplaced for at least four reasons.

First, whether Martin's interest in the fishing permit was consonant with state statutes is irrelevant under Alaska law. Aiello argues that the common-law privileges should apply only to those "participants [in the judicial process who are] authorized by law;" that is, if a litigant's claim to judicial process is eventually found to be

without sound legal basis, the litigant is not a "participant authorized by law," and neither lawyer nor client can claim the privilege. Thus, he argues, if the claim Lewis asserted to the CFEC was legally unsound, then nothing Lewis said to the CFEC (and, apparently, nothing to which Martin testified as a witness at the CFEC hearing or as a party to Martin v. Roller) can be privileged.

However, the "participants authorized by law" language which Aiello finds helpful to his Petition is irrelevant here; it is part of California's statutory privilege, not Alaska's common-law privilege.[7] Alaska follows the Restatement and requires only participation in a judicial proceeding and "pertinen[cy] to the matter under inquiry." Nizinski, 517 P.2d at 756. Pertinency is a question of law for the court's decision. Nizinski, 517 P.2d at 756. "The privilege embraces anything that may possibly be pertinent, and all doubt should be resolved in favor of its relevancy or pertinency."

Lee v. Nash, 671 P.2d 703, 706 (Ore.App. 1983). Lewis' call to the CFEC, Martin's box-checking testimony before the CFEC, and Martin's response to requests to admit in Martin v. Roller were clearly "pertinent to the matter under inquiry," as the District court properly found, regardless of the legal merit of Martin's claim to the permit.

Petitioner Aiello attempts to find Alaskan support for his argument by quoting Schneider v. Pay 'n Save Corp., 723 P.2d 619, 624 (Alaska 1986), which held that certain statements are privileged only if "made for the protection of a lawful business, professional, property, or other pecuniary interest." Pet., p. 42 (emphasis added). The Schneider case, however, involved not the absolute privileges applied in the judicial context, but the conditional privilege afforded extra-judicial actions taken to further one's own business interests. An actor's motive is always relevant to the application of a conditional privilege, but never relevant to the

application of an absolute privilege. It is this distinction, misunderstood by Aiello, which makes an absolute privilege absolute.[8]

Second, Aiello misinterprets even the California statutory standard In fact, "California has adopted as an elaboration of the [statutory] privilege section 586 of the Second Restatement of Torts" and that section's explanatory comments. Financial Corp. of America v. Wilburn, 234 Cal. Rptr. 653, 657 (Cal.App. 1987). Thus, while explained somewhat differently in judicial dicta, the California privileges are fundamentally the same as Alaska's.

Aiello nonetheless concentrates on the California courts' requirement that the publication for which protection is sought have "involved litigants or other participants authorized by law," Younger v. Solomon, 113 Cal. Rptr. 113, 121 (Cal.App. 1974), arguing thence that a litigant whose claim is eventually found to be legally erroneous cannot be a "participant authorized by law." While the California

courts have apparently not examined this element in detail, it is evident that it is not designed to require investigation into the underlying merit of every judicial proceeding in which allegedly defamatory statements are made, but rather to preclude protection of statements made in court by persons who have no normal, judicially-related reason to be there. Even in California, "[t]he attorney is not an insurer to his client's adversary that his client will win in litigation." Tool Research & Engineering Corp. v. Henigson, 120 Cal. Rptr. 291, 297 (Cal.App. 1975). Under California law, like Alaska law, motive is irrelevant to the application of judicial privileges: "This privilege [of an attorney] is absolute in that it applies regardless of whether a statement was uttered with malice or bad faith." Financial Corp. of America, 234 Cal. Rptr. at 656. Clearly, an advocate (Lewis), a party (Martin), and a witness (Martin again) are "participants authorized by law" whose

statements in the judicial context would be privileged even under the California standards that Aiello mistakenly espouses.

Third, Aiello's argument that Martin's claim to the permit was, as a legal matter, unsound, and that Lewis' filing of Martin v. Roller therefore constituted "a reckless disregard of the rules of statutory authority," Pet., p. 35, simplifies the issues in Martin v. Roller to an absurd degree.[9] That suit was litigated in Alaska's superior court for over five years, surviving a motion for summary judgment brought by Roller on the same legal grounds that Aiello has urged upon the federal courts in his collateral suit. Martin v. Roller ended with a stipulated dismissal, each party to bear his own costs and attorney's fees.

The issue of Martin's interest in the permit remained both legally and factually complex. The Alaska Supreme Court in Brown v. Baker, 688 P.2d 943, at 947-48 (Alaska 1984), while holding that the "promise" in

that case to return a fishing permit was an impermissible security interest, further explained that "it is not the case that all unlawful agreements are ipso facto void. If the denial of relief is disproportionately inequitable the right to recover will not be denied," quoting Jackson Purchase, Etc. v. Local Union 816, 646 F.2d 264, 267 (6th Cir. 1981). Martin, through his attorney Lewis, argued successfully in Martin v. Roller that factual issues precluded summary judgment against him on his claim to equitable relief on his contract with Roller. Even assuming that Martin's interest in the permit was "legally unsound" under Alaska's statutes, as Aiello insists, trial could still have established Martin's right to a money judgment for breach of contract.

Aiello himself, in his brief before the Court of Appeals, conceded the depth of the factual controversy surrounding the Martin-Roller sale:

> Certainly, the question of whether appellee Martin, who did not own the permit transferred by his son to Roller

> by "gift" according to requisite transfer documents admittedly filled in by appellee or his son, "sold" a permit to Roller for $100,000 is a question of fact still undetermined after five years of litigation.

Brief, p. 32. It was clearly unreasonable for Aiello to expect the District Court in his collateral lawsuit to determine the "question of fact still undetermined after five years of litigation" in Martin v. Roller before it could rule on the applicability of Alaska's absolute privileges.

Fourth, Aiello's argument that only prevailing litigants are entitled to assert judicial privileges would, if accepted, impose tremendous burdens on the courts. The first burden would be an increase in the court's responsibilities in any case in which judicial privileges are raised. Before determining the applicability of the privilege, the court would have to determine whether the defendant's position in the collateral suit was legally correct, just as Aiello sought to have the District Court

below determine the merits of Martin's claim against Roller.

The second burden would be an increase in lawsuits generally. To accept Aiello's premise -- that a litigant is not "authorized by law" and therefore loses any judicial privileges whenever his case is found to have been legally unsound -- would be to prompt a never-ending spiral of litigation, each new case feeding on the carcasses of its forebears. Anyone adversely affected by litigation to which he was not a party could sue the loser for having asserted a claim that was eventually proven unfounded and having thereby interrupted his business or caused him emotional distress. The social goals which prompted the creation of absolute privileges in the judicial context would clearly not be served by such a result.

B. Alaska's State Law of Privilege Affects No Federal Interest

Virtually every American jurisdiction,

like Alaska, applies absolute privileges to statements made in the course of a judicial proceeding.[10] Yet Aiello would have this Court hold, apparently as a matter of over-arching federal common law in derogation of the Erie doctrine, that these state-law privileges must give way before state-law tort claims of the sort he alleges.

This Court has itself recognized the legitimacy of absolute common-law privileges in the judicial context. In Forrester v. White, 56 U.S.L.W. 4067, 108 S.Ct. 538, 543, 98 L.Ed.2d 555 (1988), for example, the Court recently noted, "The common law's rationale for these decisions [applying absolute privileges] -- freeing the judicial process of harassment or intimidation -- has been thought to require absolute immunity even for advocates and witnesses." See also Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 49, 91 S.Ct. 1811, 1822-23, 29 L.Ed.2d 296 (1971), noting that "the libel laws of most of the States" subordinate an individual's

interests in libel recovery to the absolute privileges accorded to "judges, attorneys at law in connection with a judicial proceeding, parties and witnesses to judicial proceedings, congressmen and state legislators, and high national and state executive officials," and that such persons are protected "even if they publish defamatory material from an improper motive, with actual malice, and with knowledge of its falsity."

In Briscoe v. LaHue, 460 U.S. 322, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), this Court presented its most through review of the common-law judicial privileges, holding that they had not been abrogated by the civil-rights recovery authorized by 42 U.S.C. § 1983. The Court found that "[a] rule of absolute witness immunity has been adopted by the majority of Courts of Appeals," 460 U.S. at 328 n.4, 103 S.Ct. at 1112 n.4; that similar privileges were "well established in English common law," 460 U.S. at 330-31, 103 S.Ct. at 1113; and that such

immunities served "the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible," 460 U.S. 332-33, 103 S.Ct. 1114, quoting Calkins v. Sumner, 13 Wis. 193, 197 (1860). "In short," the Court explained, "the common law provided absolute immunity from subsequent damages liability for all persons -- governmental or otherwise -- who were integral parts of the judicial process." 460 U.S. at 335, 103 S.Ct. at 1115-16.

Thus, the Alaska rules of law on which both the District Court and the Court of Appeals based their decisions in this case are fully consonant with general legal principles embraced by this Court. In Briscoe, this Court refused to subordinate the common law privileges to a plaintiff's interest in a statutory recovery under 42 U.S.C. § 1983. There is even less reason for the Court to subordinate the privileges to Aiello's interest in the common-law tort causes of action he asserted below.

Evidence below that any tort had in fact been committed was nonexistent. Although alleging intentional torts, Aiello conceded in his deposition testimony that neither Lewis nor Martin had any animosity toward him personally, or "any motive or desire or intent to injure [his] financial interests." CR 134, exh. A, pp. 6-8. While deciding the case on grounds of absolute privilege, the District Court noted that Aiello had not presented even a prima facie case of tortious interference under Alaska law. RT 31. The Court also held that the conduct of which Aiello complained was not "the slightest bit like" the conduct required for a prima facie case of outrage. RT 35-36.[11]

Aiello's argument that Lewis, by advancing a legal position which Aiello claims to find questionable, violated Alaska's canons of legal ethics gives his tort claims no added support: "Every court that has examined this question has concluded that the Code of Professional

Responsibility does not, per se, give rise to a third party cause of action for damages." Mozzochi v. Beck, 529 A.2d 171, 176 (Conn. 1987); Sullivan v. Birmingham, 416 N.E.2d 528, 534 (Mass.App. 1981). For this Court to review long-established judicial privileges for the benefit of a tort plaintiff who is unable to present even a prima facie case in tort would be nothing more than a waste of the Court's resources.

C. This Court's Decision in Nix v. Whiteside Has Nothing To Do With State-Law Tort Privileges

Petitioner Aiello asks this Court to hold that the usual common-law privileges do not apply to the tort causes of action he alleges against Lewis because this Court's decision in Nix v Whiteside necessarily abrogated common-law privileges whenever they could be used to protect an attorney's breach of his ethical obligations. Pet., p. i. However, Nix v Whiteside has nothing to do with the issue presented here.[12] The

decision discussed the circumstances under which a lawyer's conduct falls short of the minimum of professionalism required by the Sixth Amendment's right to counsel in criminal proceedings; it did not purport to address the question of when a lawyer's conduct falls short of standards of care established by state tort law, much less whether such conduct, if tortious, should abrogate state-law privileges.

The "question presented" in Nix v. Whiteside, according to Chief Justice Burger, author of the Court's opinion, was

> the definition of the range of "reasonable professional" responses to a criminal defendant client who informs counsel that he will perjure himself on the stand. We must determine whether, in this setting, [an attorney's] conduct fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment.

475 U.S. at 166, 106 S.Ct. at 994 (emphasis added). Two concurring opinions emphasized that the application of Nix v. Whiteside was limited to cases in which an attorney's

conduct must be judged by constitutional standards:

> This court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant of jurisdiction over legal ethics. . . .
>
> [T]he Court cannot tell the states or the lawyers in the states how to behave in their courts, unless and until federal rights are violated.

475 U.S. at 176, 177, 106 S.Ct. 1000 (Justice Brennan, concurring) (emphasis in original). Justice Blackmun, also concurring in the judgment, explained:

> The only federal issue in this case is whether [the attorney's] behavior deprived [his client] of the effective assistance of counsel; it is not whether [the attorney's] behavior conformed to any particular code of legal ethics. . . .
>
> It is for the States to decide how attorneys should conduct themselves in state criminal proceedings, and this Court's responsibility extends only to ensuring that the restrictions a State enacts do not infringe a defendant's federal constitutional rights.

475 U.S. at 188, 189-90, 106 S.Ct. at 1006; see also 475 U.S. at 181 n.2, 106 S.Ct. at 1002 n.2 (Justice Blackmun, concurring),

quoting with approval the opinion of the Court below that the State supreme court "is the last word on all questions of state law, and the Code of Professional Responsibility is a species of state law."

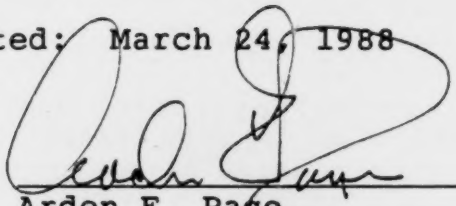
Thus, while Petitioner Aiello struggles mightily to convince this Court that Lewis' advancement of his client's claim to the limited entry permit was unethical, his argument, even if accepted, raises an issue of purely state concern. Because of "the value of preserving the [Supreme] Court's own attention and energies for the federal questions that clamor for deliberate decision[,] State law is properly left to the primary keeping of the courts of appeals and, through them, to the district courts." C. Wright, A. Miller, E. Cooper, 17 Federal Practice and Procedure (1978), § 4036, p. 31.

CONCLUSION

The two lower courts properly decided issues of state law which do not require this Court's attention. Respondents Martin

and Lewis therefore respectfully urge the Court to deny Aiello's Petition for Writ of Certiorari.

Dated: March 24, 1988



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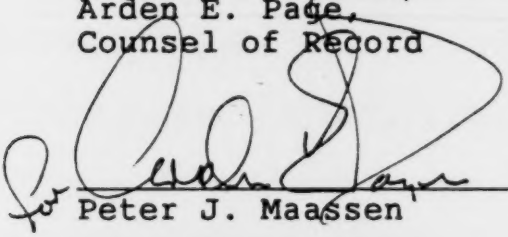

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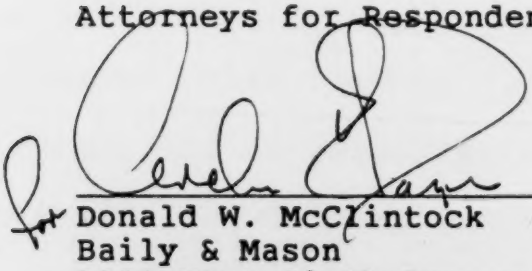

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FOOTNOTES

[1] Because the facts may be stated more succinctly and clearly than they are in the Petition, Respondents present this brief chronology.

[2] The exact substance of Lewis' call is disputed but is not essential to the determination of the legal issues in this case.

[3] Martin v. Roller was dismissed with prejudice in September 1987 by agreement of the parties, each party bearing his own costs and attorney's fees.

[4] Respondents subsequently removed the suit to federal district court in California pursuant to 28 U.S.C. § 1332 (diversity of citizenship), Aiello being a California citizen and Martin and Lewis being Alaska citizens. Venue was then changed from California to Alaska.

[5] Under the doctrine announced in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal courts sitting in diversity cases follow State substantive law as enunciated by the State's highest court. Defamation law, unless it impinges on the First Amendment rights of the speaker, is a matter of State substantive law. Lavin v. New York News, Inc., 757 F.2d 1416, 1418-19 (3rd Cir. 1983); see Gertz v. Robert Welch, Inc., 418 U.S. 323, 345-56, 94 S.Ct. 2997, 3030, 41 L.Ed.2d 789 (1974) ("[W]e conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual").

[6] See Drummond v. Stahl, 618, P.2d 616, 619 (Ariz.App. 1980), cert. denied 450 U.S. 967, 101 S.Ct. 1484, 67 L.Ed.2d 616 (1981) (privileges bar claim for "tortious interference with a contractual

relationship"); Rosenthal v. Irell & Manella, 185 Cal.Rptr. 92, 95 (Cal.App. 1982) ("abuse of process, intentional infliction of mental distress, inducing breach of contracts, interference with prospective economic advantage, fraud, and negligence"); Sullivan v. Birmingham, 416 N.E.2d 528, 530 (Mass.App. 1981) ("libel and intentional infliction of emotional distress"); Franson v. Radich, 735 P.2d 632, 635 (Ore.App. 1987) ("intentional infliction of emotional distress").

7 Conceding the unhelpfulness of Alaska law to his position, Aiello relies heavily, throughout his Petition, upon irrelevant California caselaw, statutes, and ethical canons.

8 Aiello's invocation of the Alaska Supreme Court's discourse on attorney fraud in Mallonee v. Grow, 502 P.2d 432 (Alaska 1972) (Pet., pp. 35-36, 45-46), is also misplaced. The decision discussed conditions under which a party could be relieved from judgment because of "fraud on the court," including misconduct by an attorney in wrongfully securing a judgment for his client. Under Aiello's theory of the case, however, the "fraud on the court" at issue here occurred in Martin v. Roller, which has since been dismissed by stipulation. Granted that a court has a "duty to rectify the wrong" when a fraud has been perpetrated upon it, Mallonee, 502 P.2d at 438, the "fraud" Aiello alleges in this case occurred, allegedly, in a suit in which he was not involved, against a party other than himself. Alaska's state courts are well able to rectify wrongs perpetrated against them without the "aid" of third-party tort litigation.

9 Aiello concedes in his Petition, "If Martin had a claim of right or color of title in the permit, both he and his attorney would be privileged to prevent the

transfer of the permit to Petitioner and thus to interfere with Petitioner's business relatioship." Pet., p. 41.

10 See Walker v. Majors, 496 So.2d 726, 729-30 (Ala. 1986); Green Acres Trust v. London, 688 P.2d 617, 621-22 (Ariz. 1984); Pogue v. Cooper, 680 S.W. 2d 698, 700 (Ark. 1984); Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180, 200 (Cal.App. 1983); Club Valencia Homeowners' Ass'n v. Valencia Associates, 712 P.2d 1024, 1027 (Colo. App. 1985); Mozzochi v. Beck, 529 A.2d 171, 173 (Conn. 1987); Nix v. Sawyer, 466 A.2d 407, 410 (Dela. Super. 1983); Mohler v. Houston, 356 A.2d 646, 647 (D.C. App. 1976); Wright v. Yurko, 446 So.2d 1162, 1164 (Fla. App. 1984); McCarthy v. Yempuku, 678 P.2d 11, 14 (Haw. App. 1984); Richeson v. Kessler, 255 P.2d 707, 709 (Idaho 1953); Weiler v. Stern, 384 N.E.2d 762, 763 (Ill.App. 1978); Briggs v. Clinton County Bank & Trust Co., 452 N.E.2d 989, 997 (Ind.App. 1983); Asay v. Hallmark Cards, Inc., 594 F.2d 692, 697 (8th Cir. 1979) (applying Iowa law); Clear Water Trucking Co. v. M. Bruenger & Co., 519 P.2d 682, 685-86 (Kan. 1974); Massengale v. Lester, 403 S.W.2d 701, 702 (Ky.App. 1986); Sinclair v. Sullivan, 447 So.2d 36, 38 (La.App. 1984); Dineen v. Daughan, 381 A.2d 663, 644 (Me. 1978); Froess v. Bulman, 610 F.Supp. 332, 337-39 (D.R.I. 1984) (applying both Maryland and Rhode Island law); Sullivan v. Birmingham, 416 N.E.2d 528, 530 (Mass. App. 1981); Timmis v. Bennett, 89 N.W.2d 748, 752 (Mich. 1958); Matthis v. Kennedy, 67 N.W.2d 413, 419 (Minn. 1954); Houska v. Frederick, 447 S.W.2d 514, 518-19 (Mo. 1969); Cummings v. Kirby, 343 N.W.2d 747, 748 (Neb. 1984); Bull v. McCuskey, 615 P.2d 957, 961 (Nev. 1980); McGranahan v. Dahar, 408 A.2d 121, 124-25 (N.H. 1979); Piper v. Scher, 533 A.2d 974, 976-77 (N.J. Super. 1987); Penny v. Sherman, 684 P.2d 1182, 1185 (N.M. App. 1984); Weiner v. Weintraub, 239 N.E.2d 540, 540-41 (N.Y. 1968); Harris v. NCNB National Bank of North

Carolina, 355 S.E.2d 838, 841-42 (N.C. App. 1987); Theiss v. Scherer, 396 F.2d 646, 649 (6th Cir. 1968) (predicting Ohio law); Lee v. Nash, 671 P.2d 703, 705-06 (Ore.App. 1983), rev. denied 675 P.2d 491 (Ore. 1984); Triester v. 191 Tenants Ass'n, 415 A.2d 698, 701-02 (Pa. Super. 1979); Janklow v. Keller, 241 N.W.2d 364, 367-68 (S.D. 1976); Medlock v. Ferrari, 602 S.W.2d 241, 245 (Tenn. App. 1979); Russell v. Clark, 620 S.W.2d 865, 868-69 (Tex. Civ. App. 1981); Hansen v. Kohler, 550 P.2d 186, 189-90 (Utah 1976), Watt v. McKelvie, 248 S.E.2d 826, 828 (Va. 1978); McNeal v. Allen, 621 P.2d 1285, 1286-87 (Wash. 1980); Kensington Development Corp. v. Israel, 407 N.W.2d 269, 273 (Wis.App. 1987); Blake v. Rupe, 651 P.2d 1096, 1106-07 (Wyo. 1982), cert. denied 459 U.S. 1208, 103 S.Ct. 1199, 75 L.Ed.2d 442 (1983); Pacific Furniture Mfg. Co. v. Preview Furniture Corp., 626 F.Supp. 667, 679 (M.D.N.C. 1985), aff'd 800 F.2d 1111 (Fed. Cir. 1986) (apparently applying federal common law).

11 A "threshhold determination whether the severity of the emotional distress and the conduct of the offending party warrant a claim of intentional infliction of emotional distress" is properly left to the court under Alaska law. Richardson v Fairbanks North Star Borough, 705 P.2d 454, 456 (Alaska 1985).

12 Aiello's general reliance on caselaw construing the breadth of the attorney-client privilege (including this Court's decision in Nix v. Whiteside), Pet., pp. 48-50, is misplaced. Testimonial privileges and tort privileges have divergent histories and rationales which are not intended to be interchangeable. Respondents are not relying upon their attorney-client relationship to shield them from tort liability, but rather upon their individual absolute privileges as

participants in judicial proceedings. Whether a lawyer and client can conspire in secret to commit a crime, using the attorney-client privilege to shield their activities, and whether a lawyer and client can openly pursue judicial process without fear of retaliatory tort liability, are not analogous questions; society's desire for complete candor in the judicial process sometimes defeats the attorney-client privilege, while it always supports the judicial privileges.

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

FRANK V. AIELLO,	) Case No. A83-193 Civil
Plaintiff,	) Anchorage, Alaska
vs.	) Wednesday, February 4, 1987, 2:00 P.M.
CALVIN MARTIN, et al.,	) Oral Argument on Motion for Summary Judgment (Telephonic)
Defendants.	)

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ANDREW J. KLEINFELD
UNITED STATES DISTRICT COURT JUDGE

(Beginning at p. 30 of the Transcript)

THE COURT: I'm granting the motion for summary judgment. I believe that most of the arguments by the defendants are well taken. I'm going to recite some points that particularly struck me, but these are not exclusive of other grounds upon which I'm granting the motions. It appears to me that Martin sold the permit to Roller, Roller sold the permit to Aiello for a lower price, Aiello, after -- I believe he -- as he put it in his deposition, "Looking at the law and thinking about it," decided

to take his chances on the legal status. Aiello did not get what he bargained for. He didn't get the permit and pay the $64,000.00 to Roller. However, he has not sued Roller for breach of contract. Instead he sued Martin, who did not own the permit but purported to sell his son's permit to Roller, and Martin's lawyer, Lewis. He has not sued them on a theory of subrogation standing in Roller's shoes for breach of the contract to sell the permit to Roller, nor has he sued as an asignee [sic] of whatever rights Roller might have against Martin for breach of Martin's contract to sell to Roller. It can only be inferred, considering the six files of extensive legal debate that has [sic] proceeded today's ruling that Mr. Aiello gave the most careful thought to how to proceed and decided on a tactical and strategic basis that he would be better off to proceed in tort against the parties that he did rather than in contract either against the party with -- whom he had

made the contract, or against the party who had contracted with that intermediary.

The case is preceeded [sic] on a motion for summary judgment. It's not a 1236 [12(b)(6)] motion. Parties have had plenty of time, it's quite an old case, to refine their theories, and it does appear that Mr. Aiello's theories of the case were chosen after careful strategic consideration, and that he stuck to them for strategic reasons, so there is no particular reason, I suppose, that there is any defect in his pleadings. Got the case off onto a wrong track.

On the theory of interference with contracts, the tort isn't as simple as to say that anyone who does anything that interferes with somebody elses [sic] enjoyment of economic advantages is liable in tort to the party who would have had the pleasure of performance of someone else's contract. The elements layed [sic] out in Bendix Corporation vs. Adams, 610 P.2d 24, Alaska, 1980, are number one, a valid

contract between plaintiff and another person. Presumably that would be Aiello and Roller. Two, that defendant, that would be Lewis and Martin, had knowledge of the contract, and that their intent was to induce a breach of that contract. Three that the contract was breached by the other party, that is that Roller breached the contract with Aiello. Four, that the breach was caused by defendant's wrongful or unjustified conduct. And five, that the plaintiff suffered damage as a result of the breach. It appears to me that in the face of a motion for summary judgment Aiello has not shown, by affidavits or other appropriate submissions, the existence of any one of these five elements, let alone all five. He hasn't proved the validity of the contract between himself and Roller, though perhaps that's conceded by the defendant since they haven't argued that. He certainly has not established that the defendants knew of that contract and intended to induce a

breach of the Roller/Aiello contract. The evidence tends more to show an intent to prevent Roller from getting the permit from Martin rather than to prevent Aiello from getting the permit from Roller, and so forth through the elements.

Moreover, on the issue of privilege, it does appear that both Martin and Lewis had numerous multiple privileges, any one of which would be sufficient to prevent the action from going forward.

Now, I am uncomfortable about Martin's lawyer calling a former law clerk in his firm who's now a hearing officer on the phone instead of sending a letter with a cross-carbon to Aiello, or -- or some other procedure that would give Aiello fair notice of the communications that were being made. There're some circumstances in which that kind of conduct is perfectly appropriate. For example, an ex parte report to the IRS that somebody has committed tax fraud is encouraged. The government offers a 10 percent reward.

There are other areas where that kind of contact is -- is wrongful, such as if a lawyer were to call a former partner who is now a judge, advise him of some matter in one of his files so that the judge would pull out the file and take some action on it. Anyone could recognize that a lawyer in that situation would be doing something wrong.

As for whether the -- the Fisheries Commission contact was right or wrong, I don't know. I make no finding on that. I don't think I need to make a finding on that. Even if it was wrong from the point of view of -- of a grievance proceeding, which this is not, and for which I make no suggestion or -- or finding, even if it was wrong it would not amount to an actionable tort of which Aiello could take advantage. Mr. Aiello's argument seems to assume that all he has to do is prove a wrong by someone in the process and -- and he has a cause of action, but it's not that simple. The Nizinski case -- Nizinski v.

Currington, 517 P.2d 754, Alaska, 1974, says that "Defamatory testimony by a witness in a judicial proceeding pertinent to the matter under inquiry is absolutely privileged." In that case we're talking about defamatory testimony which is harmful to somebody's reputation, and is also false. False statements under oath in testimony harmful to someone's reputation. They're absolutely privileged in Alaska, as in most places, because of the public policy of facilitating testimony in such forums.

In this case the lawyer's privileged to act on behalf of his client, the privilege of both to communicate with the agency, the privilege of Martin to testify before the agency are all applicable. The public policy is clear and strong that the agency needs to facilitate this kind of communication in order to carry out its mandate so whether there was a falsehood in the testimony, whether there was some ulterior impropriety or -- or motivation

with respect to the attorney or the client would not defeat the privilege or give rise to a tort action. Just because something may be wrong doesn't mean that the remedies are unlimited and extend to all persons. For example, in the Nizinski case, suppose the agency went to the Attorney General, presented evidence to the Attorney General that defamatory testimony had been knowingly given. The Attorney General might, in such a -- I'm now making it a hypothetical case rather than the Nizinski case, might have a perjury indictment to seek against the -- whatever witness had given knowingly false testimony. Nevertheless, the person harmed by it would not have the defamation action under the Nizinski case. That's not an unusual result. There's nothing anomalous about it. That's -- that's how privileges work.

With regard to the claim of outrage, the general statements in the -- in the books, both the Alaska case law and the restatement in Proser [sic], defining that

tort approach meaninglessness. It's not practical to try to determine from the general statements exactly what constitutes the tort of outrage. However, when one looks at the cases that have been decided under the tort of outrage one can see a pattern. There are certain kinds of conduct which have been successfully litigated, at least past summary judgments or motions for directed verdict on the theory of the tort of outrage, which is the one urged by the plaintiff. None of them are the slightest bit like the case at issue. They -- the -- some of the examples have been discussed by the parties in their briefs. Many are very extreme things such as telling a woman that her husband has just died when -- when he's alive and well, and the purpose was just to make her miserable, that type of thing. Nothing like the case at issue. The practical consequences of extending the tort of outrage to cases like the one at issue are that there would be no tort law at all.

Anytime a party could persuade a jury that somebody had acted in a fashion that the jury would like to punish, the jury could award unlimited damages in favor of anyone who could show some harm that flowed from the conduct. All the rules and standards that we've developed over the centuries of tort law would disappear. I don't believe this is the tort of outrage. Even if it were the tort of outrage, even if the tort of outrage -- if a genuine issue of material fact had been demonstrated, which I don't believe it is, I believe that the statute of limitations would prevent its being advanced at this point. It's too late to file a claim for outrage. Nevertheless, because some of the contours of the relief from that doctrine might be arguable where the same parties and substantially the same underlying dispute, although different events in the course of the dispute are at issue. Because the applicability of relief from that doctrine is a bit difficult in that area I do want

to make it clear that the reasons for my ruling are -- are in the alternative. I -- I don't believe, after a careful reading of -- of all the exhibits that have been filed with the motion papers that the tort of outrage is made out here even on the reading most favorable to Aiello.

The third cause of action for punitive damages depends on the first two and cannot stand independently, so it must be dismissed as well.

I believe that these rulings are despositive [sic] of the entire case. Is that correct, counsel?

MR. PAGE: I believe so, Your Honor.

THE COURT: Mr. Aiello:

MR. AIELLO: Yes, Your Honor. I would imagine they would be.

THE COURT: Anything further before we recess?

MR. PAGE: Nothing, Your Honor.

MR. AIELLO: Will Your Honor send a written copy of his decision?

THE COURT: Well, I recite my reasons

into the record like this just to avoid delaying the litigants for months while they wait for a careful written decision.

MR. AIELLO: Okay. Thank you, Your Honor. I just --

THE COURT: So all that I'm going to prepare now is an order alluding to the remarks made in open court. Anything further?

MR. AIELLO: Nothing further.

MR. PAGE: Nothing, Your Honor.

THE COURT: Court will recess.

THE CLERK: Court now stands in recess.

(Recess at 3:03 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Shari Stephens — March 26, 1987

Transcriber — Date

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED NOVEMBER 23, 1987
CATHY A. PATTERSON, CLERK
U.S. COURT OF APPEALS

FRANK V. AIELLO,	No. 87-3647
Plaintiff-Appellant,	D.C.No. CV-83-193
vs.	MEMORANDUM*
CALVIN MARTIN; STANLEY LEWIS,	
Defendants - Appellees.	

Appeal from the United States District Court for the District of Alaska
H. Russel Holland, District Judge, Presiding
Argued and Submitted November 5, 1987
Seattle, Washington

Before: ANDERSON, NORRIS, and HALL, Circuit Judges

Appellant Aiello, plaintiff below, appeals the district court's award of summary judgment to defendants-appellees

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Circuit Rule 36-3.

Martin and Lewis. The district court held that "both Martin and Lewis had numerous multiple privileges, any one of which would be sufficient to prevent the action from going forward." Transcript of Hearing Before the Honorable Andrew J. Kleinfeld, United States District Court Judge at 32 (hereinafter Summary Judgment Transcript). The trial court specifically relied upon the privilege protecting a witness from tort liability for his testimony, and the lawyer's privilege to communicate on behalf of her client in preparation for litigation. Id. at 33-34 (citing Nizinski v. Currington, 517 P.2d 754, 756 (Alaska 1974)). Therefore, under the trial court's reasoning, Lewis's telephone call to the Alaska Commercial Fisheries Entry Commission (CFEC) and Martin's testimony regarding who checked the box indicating that the transfer from Martin to Roller was a "gift," are both privileged statements which cannot give rise to a tort action.

Aiello does not dispute that the privileges identified in Nizinski would ordinarily protect Martin and Lewis's statements.[1] Rather, he argues that the privileges should not apply because Martin and his attorney, Lewis, were pursuing Martin's "illegal and unenforceable interest" in the fishing permit when they made their statements. See Blue Brief at 25-29. According to Aiello, Martin's alleged contract with Roller to transfer the permit to him in exchange for $100,000 or, in the event Roller was unable to pay, to return the permit (see Excerpt of Record at 46), violated Alaska law. Alaska Statute 16.43.150(b) provides that "an

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[1] Appellees argue correctly that Nizinski supports their contention that Martin and Lewis's statements were protected by multiple privileges. See Red Brief at 8-16, 25-27. Aiello does not disagree in his brief. He appears to concede that if Martin had an enforceable interest in the permit then the defamation privileges would protect appellees' statements.

entry permit may not be: (1) pledged, mortgaged, leased, or encumbered in any way; (2) transferred with any retained right of repossession or foreclosure."[2] Aiello argues that since the Martin to Roller transfer appears to be secured by the permit in violation of Alaska law, any interest Martin now has in the permit is illegal and unenforceable.

Aiello essentially suggests that the defamation privileges are limited to suits brought to protect interests that are not "illegal and unenforceable." Aiello's reasoning would apparently require a court to assess the merits of the underlying litigation before applying the privileges.

Aiello's argument was rejected in the court below. The district court refused to limit the scope of the privileges just

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2 An Alaska case construing this section held that a promise "to return the permit . . . is a security interest and thus, violates A.S. 16.43.150(g)." Brown v. Baker, 688 P.2d 943, 947 (Alaska 1984).

because there may have been "a wrong by someone in the process." Summary Judgment Transcript at 33. The district court said:

> In this case the lawyer's privilege to act on behalf of his client, the privilege of both to communicate with the agency, the privilege of Martin to testify before the agency are all applicable. The public policy is clear and strong that the agency needs to facilitate this kind of communication in order to carry out its mandate so whether there was a falsehood in the testimony, whether there was some ulterior impropriety or--or motivation with respect to the attorney or the client would not defeat the privilege or give rise to a tort action. Just because something may be wrong doesn't mean that the remedies are unlimited and extend to all persons.

Id. at 34. The district court, therefore, refused to limit the absolute privileges identified in Nizinski because of the "clear and strong" public policies supporting these privileges.

Aiello fails to cite any authority suggesting that the defamation privileges are abrogated as to litigants whose lawsuits are not well-founded. His reliance on cases such as Nix v. Whiteside, 106 S.Ct. 988 (1986), is completely

misplaced. See generally Red Brief at 22-25 (arguing persuasively that Aiello's authority is either inapplicable or distinguishable).[3]

In sum, the clear and strong policies underlying the defamation privileges compel the conclusion that Martin's testimony before the CFEC, his responses to requests for admissions in Martin v. Roller, and Lewis's telephone call to the CFEC prior to filing suit on behalf of Martin, cannot be the basis for liability in tort. There is no authority requiring this court to decide the merits of Martin v. Roller before deciding that the defamation privileges apply in this case.

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[3] Appellees also argue that Aiello's interpretation of the privilege is erroneous for the further reasons that it is based on California's statutory test, not Alaska's common law test, and its premise (that Martin's lawsuit is without legal foundation) ignores the fact that Martin v. Roller has survived a summary judgment motion in Alaska superior court based upon the same legal grounds Aiello is urging here. See Red Brief at 18-19.

Aiello also argues that the district court abused its discretion by awarding $3,961.32 in attorney's fees to Lewis and Martin.[4] Aiello contends that this award represents an abuse of the trial court's discretion to award fees because he has presented evidence that Lewis and Martin acted in bad faith and in "wanton disregard of statutory authority." See Blue Brief at 45. Aiello claims that even if the defendants' conduct is held to be privileged as a matter of public policy, an award of attorney's fees is nevertheless unjustified because the defendants have not prevailed on the merits. See id. (citing Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217 (9th Cir. 1987)). Greater Los Angeles Council hold that

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[4] This figure apparently represents approximately 80% of the actual fees incurred by the defendants. See Red Brief at 44.

plaintiffs who successfully sued a television station for failure to provide sufficient access to programming for handicapped persons, but whose victory was eventually reversed on appeal, could still be "prevailing parties" under the Rehabilitation Act. Id. at 219-21. This case in no way supports Aiello's contention that defendants who successfully assert a privilege as a complete defense to plaintiff's tort lawsuit are not prevailing parties.

Attorney's fees awards in diversity actions are governed by state law. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 n.31 (1975); Stokes v. Reeves, 245 F.2d 700, 702 (9th Cir. 1957). Rule 82 of the Alaska Rules of Civil Procedure provides for an award of attorney's fees to the prevailing party. Whether an allowance is made is left to the discretion of the trial court. Macri v. United States, 353 F.2d 804, 811 (9th Cir. 1965).

Appellees prevailed in the court below by successfully urging their litigation privileges as complete defenses to Aiello's suit. The district court therefore had discretion to award appellees fees. The record fails to support the claim that this discretion was abused.

Finally, Aiello's claim that certain motions in limine should have been decided before summary judgment was granted, see Blue Brief at 29-30, is unfounded. The goal of Aiello's motions was to obtain a judicial determination that the Martin-Roller transfer was illegal. Garrett v. City & County of San Francisco, 818 F.2d 1515 (9th Cir. 1987), upon which Aiello relies, is inapposite. The undecided discovery motions in Garrett were directly relevant to the summary judgment motion, since if the evidence sought in discovery had supported plaintiff's case, summary judgment would have been inappropriate. In the instant case, the outcome in the court below in no way

depended on a finding as to the legality of the Martin-Roller transfer. Thus, the district court did not err in granting summary judgment prior to ruling on the motions in limine.

AFFIRMED.